Hasanuddin bin Sinring v Public Prosecutor

COURT OF APPEAL (KOTA KINABALU) — CRIMINAL APPEAL NO S-05–15 OF 2009
RAMLY ALI, ABDUL AZIZ ABD RAHIM AND DAVID WONG JJCA
16 APRIL 2013

Criminal Law — Murder — Appeal against conviction and sentence — Accused sentenced to death — Whether trial judge erred in sentencing accused — Penal Code s 302

Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — Accused sentenced to death — Whether prima facie case had been established by prosecution — Whether trial judge erred when he rejected appellant's defence — Whether accused disclosed defence during prosecution case — Whether accused had mens rea to commit murder — Penal Code s 302

The deceased and her daughter ('PW3') had returned to their car after buying cakes. Before the deceased could shut her side of the car door, the appellant attacked the deceased with a knife and stabbed her. The deceased succumbed to her injuries and died. PW3 testified that she had noticed the appellant was staring at them as they walked back to their car. A few days after the incident, the appellant was arrested by the police and a knife in its sheath was found to be in the appellant's possession. A DNA analysis on the knife confirmed that the DNA profile of the bloodstains on the knife matched that of the deceased's. In the High Court, the appellant was found guilty for the charge of murder, an offence under s 302 of the Penal Code ('the Code') and was sentenced to death. In the present appeal, the appellant submitted that the learned judge erred when he found that a prima facie case had been established by the prosecution; when he rejected the appellant's defence on the ground that the appellant did not disclose it during the prosecution case; and when he found that the appellant had the mens rea or intention to commit murder at the end of trial.

Held, dismissing the appeal:

(1) The learned judge in his detailed analysis of evidence had rightly concluded that a prima facie case had been proved by the prosecution. The court's view was formed after testing with care the reasons for his conclusion with the evidence tendered by the prosecution. It could also be seen from the grounds the learned judge had left no stone unturned so to speak and had rebutted every contention raised by the appellant at the end of the prosecution case. In short, the learned judge had correctly applied the maximum evaluation test as required by law (see para 22).

(2) The court had examined the grounds of the learned judge in the context of the totality of the evidence and were of the view that his analysis stood up to the test of intense and detailed scrutiny. It could be seen that only on two occasions that the learned judge utilised the appellant's failure to put his case during the prosecution case to reject the appellant's defence. However the learned judge had referred to other overwhelming evidence as to why the defence should be rejected and for that reason, there was no merit in the appellant's contention. It was not insignificant that the appellant seriously disputed the stabbing (see para 26).

(3) Intention of the appellant could only be deduced from his conduct and the surrounding circumstances. The learned judge relied on the stab wounds inflicted on the deceased and having considered his detailed analysis, the court found that his conclusion could not be faulted (see para 28).

[Bahasa Malaysia summary

Si mati dan anak perempuannya ('PW3') kembali ke kereta mereka selepas membeli kek. Sebelum si mati dapat menutup pintu kereta sebelahnya, perayu menyerang si mati dengan pisau dan menikamnya. Si mati mengalah kepada kecederaannya dan meninggal dunia. PW3 memberi keterangan bahawa dia telah perasan yang perayu merenung mereka semasa mereka berjalan balik ke kereta mereka. Beberapa hari selepas kejadian tersebut, perayu ditangkap oleh polis dan pisau yang dalam sarungnya didapati di dalam pegangan perayu. Analisa DNA ke atas pisau mengesahkan bahawa profil DNA kesan darah ke atas pisau hampir sama dengan si mati. Di Mahkamah Tinggi, perayu didapati bersalah atas tuduhan membunuh, kesalahan di bawah s 302 Kanun Keseksaan ('Kanun') dan dihukum mati. Dalam rayuan ini, perayu berhujah bahawa hakim yang bijaksana tersilap apabila beliau mendapati bahawa kes prima facie telah dibuktikan oleh pihak pendakwaan; apabila dia menolak pembelaan perayu atas alasan bahawa perayu tidak mengemukakannya semasa kes pendakwaan; dan apabila dia mendapati bahawa perayu mempunyai mens rea atau niat untuk melakukan pembunuhan di akhir perbicaraan.

Diputuskan, menolak rayuan:

(1) Hakim yang bijaksana dalam analisa terperinci keterangannya telah betul menyimpulkan bahawa kes prima facie telah dibuktikan oleh pendakwaan. Pandangan mahkamah dibentuk selepas menguji dengan berhati-hati alasan-alasan untuk kesimpulannya dengan keterangan yang dikemukakan oleh pihak pendakwaan. Ia juga dapat dilihat daripada alasan-alasan, hakim yang bijaksana telah melakukan segala yang mungkin dan mematahkan setiap hujahan yang dibangkitkan oleh perayu pada akhir kes pihak pendakwaan. Secara ringkasnya, hakim yang bijaksana telah secara betul menggunapakai ujian penilaian maksimum seperti yang dikehendakki oleh undang-undang (lihat perenggan 22).

(2) Mahkamah telah memeriksa alasan-alasan hakim yang bijaksana dalam konteks keseluruhan keterangan dan berpendapat bahawa analisanya menggunakan ujian 'test of intense' dan penelitian terperinci. Ia dapat dilihat bahawa hanya pada Kali Kedua hakim yang bijaksana menggunakan kegagalan perayu untuk memutuskan kesnya semasa kes pihak pendakwaan untuk menolak pembelaan perayu. Walau bagaimanapun hakim yang bijaksana telah merujuk kepada keterangan jelas yang lain mengapa pembelaan patut ditolak dan untuk alasan tersebut, tiada merit di dalam hujahan perayu. Adalah tidak penting bahawa perayu dengan serius mempertikaikan penikaman tersebut (lihat perenggan 26).

(3) Niat perayu hanya dapat disimpulkan daripada tingkah lakunya dan keadaan sekeliling. Hakim yang bijaksana bergantung atas luka tikaman yang dikenakan ke atas si mati dan mengambil kira analisa terperincinya, mahkamah mendapati bahawa kesimpulannya tidak boleh dipertikaikan (lihat perenggan 28).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1461–1466.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (folld)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (folld)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

Penal Code s 302

Appeal from: Criminal Trial No K45–04 of 2005-II (High Court, Kota Kinabalu)

Farah Ezlin Yusop Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Hamid Ismail (Hamid & Co) for the accussed.

David Wong JCA:

INTRODUCTION

[1] This is an appeal by the appellant/accused against the decision of the

High Court in which he was found guilty of the charge of murder an offence under s 302 of the Penal Code for causing the death of one Elizabeth Wong Oi Chin ('the deceased') on 31 October 2004 at about 6.15pm, at the car park behind Poring Cinema, Asia City, Kota Kinabalu, Sabah and was sentenced to death.

[2] On 22 March 2013, we heard the appeal and after giving due consideration to the evidence adduced in the trial court and submissions by respective counsel, we dismissed the appeal. We now give our grounds for that decision.

BACKGROUND FACTS

[3] The prosecution case was based on the following factual matrix. On that fateful day at about 6.15pm, the deceased together with her daughter Sharneal Chai Wi Vern ('PW3') went to buy cakes at the stalls set up at the Asia City area during the month of Ramadhan. Their car was parked behind the Poring Cinema. After buying cakes, they returned to their car but as the deceased got into the car but before the deceased could shut her side of the car door; the appellant attacked the deceased with a knife and stabbed her.

[4] PW3 attempted to help her mother by grabbing the knife during the attack but to no avail and with her hand cut during the process. PW3 also testified that the she had noticed the appellant was staring at them as they walked back to their car. The appellant ran away after the attack.

[5] Both the deceased and PW3 then walked to a nearby Clinic Sihat but as there was no doctor on duty there, the deceased was sent to the Queen Elizabeth Hospital ('the QEH') in an ambulance, accompanied by PW3 and her husband ('PW2') who had arrived at the clinic in the meantime. The deceased, upon arrival at QEH, was admitted to the casualty department where the doctors conducted emergency surgery on her. Unfortunately she could not be saved and at about 1.40am on 1 November 2004 she was pronounced dead.

[6] Dr Jessie Hui ('PW13'), a forensic pathologist, conducted a post-mortem on the deceased on 1 November 2004 at the QEH Mortuary wherein it is stated that the cause of death was a stab wound to the abdomen.

[7] The appellant was arrested by the police a few days after the day of the incident on 5 November 2011 in Tawau by DSP Mohd Azhar Hamim (PW16) the investigation officer in this case. Two bags, one blue, one red, were seized from the appellant. A knife in its sheath was found inside the black bag, (exhs P5 and P5(a) respectively).

[8] The knife was then sent to the Chemistry Department Malaysia for DNA analysis. The analysis was conducted by a chemist, one Mr Primulapathi Jaya ('PW12'). In his report, he stated that DNA profile from bloodstains on the knife matched the DNA profile developed from the blood sample of the deceased.

GROUNDS OF APPEAL

[9] From the submission of learned counsel for the appellant, he raised only three grounds and they are these:

(a) the learned judge erred when he found that a prima facie case has been established by the prosecution;

(b) the learned judge erred when he rejected the appellant's defence on the ground that the appellant did not disclose it during the prosecution case; and

(c) the learned judge erred when he found that the appellant had the mens rea or intention to commit murder at the end of trial.

[10] We shall deal with the grounds in the order as set out.

Ground 1: High Court's finding of prima facie case

[11] In his grounds the learned judge set out the ingredients required to prove a prima facie case of murder and they were these:

(a) that Elizabeth Wong Oi Chin (the deceased) is dead;

(b) that her death was caused by or inconsequence of the act of the accused;

(c)

(i) that the accused had intended by his act to cause the deceased's death; or

(ii) had done such act with the intention of causing such bodily injury as the accused knew to be likely to cause the death of the deceased; or

(iii) had done the act with the intention of causing bodily injury to the deceased, and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death; or

(iv) had done the act with the knowledge that the act was so imminently dangerous that it must in all probability cause death, and commits such act without any excuse for incurring the risk of causing death or such injury.

First ingredient

[12] On the first ingredient (death of the deceased) the learned judge found that there was no serious challenge that the deceased was one Elizabeth Wong Oi Chin but learned counsel for the appellant did contend that the deceased's body was not identified to PW13, the forensic pathologist by any member of the family. The learned judge rejected this contention for the simple reason that there was ample evidence in court to confirm that PW13 knew the person she conducted post mortem on is Elizabeth Wong Oi Chin. This is what the learned judge said:

> Dr Jessie Hui testified that before she conducted the post-mortem on the deceased on 1 November 2004 at 11.50am at the QEH Mortuary a form has to be signed by a member of her family to identify the body and in this case Wong Kon Fah (PW11) had do so. This is stated in Dr Jessie Hui's post-mortem report exh P38. But Dr Jessie Hui said she could not remember whether she saw PW11 before or after the post-mortem. PW11 himself testified that he had seen the deceased's body at the mortuary before and after the post-mortem but he said he never attended the post-mortem nor did he identify the body to Dr Jessie Hui. In the light of the above evidence, the defence contended that there are doubts about the identity of the body on which Dr Jessie Hui conducted the post-mortem on and whether that person was Elizabeth Wong Oi Chin. I do not agree.
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> Dr Jessie Hui testified that the post mortem was conducted in the presence of Insp Syahrin, L/Kpl Lucas Ericson a police photographer and Dr Chieng Thiong How. This is recorded in the post mortem report exh P38. Dr Jessie Hui said photographs were taken during the post mortem by L/Kpl Lucas Ericson. Dr Jessie Hui was shown some photographs (exh P3(1)–(13)) and she confirmed those photographs were taken during the post mortem of the deceased.
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> Some of those photographs clearly show the face of the deceased. Those photographs exh P3(1)–(13) were also shown to Wong Kon Fah (PW11) the deceased's brother and he confirmed that the lady in the photos is his sister Elizabeth Wong Oi Chin. The same photographs exh P3(1)–(13) were also shown to the deceased's husband and he identified the lady in the photographs as his wife Elizabeth Wong Oi Chin. One of the photographs taken at the post mortem exh P3(2) which shows the face of the lady on whom the post mortem was being conducted, was shown to Sharneal Chai (PW3) and she confirmed it was that of her mother.
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> L/Kpl Lucas ak Ericson Sigon (PW5) the police photographer who was present during the post mortem of the deceased confirmed he had taken the photographs exh P3(1)–(13) during the post-mortem of the deceased at the QEH Mortuary on 1 November 2004 conducted by Dr Jessie Hui.
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> I am satisfied from the identification of the deceased's body by PW11, PW2 and PW3 from the photographs exh P 3(1)–(13) taken of her body during the post-mortem, that the body on which Dr Jessie Hui conducted the post-mortem on 1 November 2004 at the QEH Mortuary was that of the deceased Elizabeth Wong Oi Chin.

I am accordingly satisfied that the first ingredient has been proved.

[13] There is no principle of law which requires that the identification of the deceased named in the charge to the pathologist must be done by a relative of the deceased. Like any elements of the offence, it can be established by other evidence as was done in this case. Those other evidence are as set out by the learned judge and we see no error in the learned judge's analysis of the evidence.

The second ingredient

[14] In respect as to ingredient 2 (death caused by the appellant), the learned judge again relied on undisputed evidence to reach his conclusion and those evidence were these. PW3, who was at the scene of the crime, saw the stabbing of her mother by the appellant. PW2 had also seen his deceased/wife holding her abdomen which was bleeding. PW13 testified that she found three stab wounds on the deceased and they are:

(a) one stab wound on the left front of her chest measuring 1.5cm long;

(b) there was another stab wound on the right front on the abdomen measuring 2cm long. The stab wound was directed inwards cutting the inferior surface of the liver, the base of the gall bladder and the portal vein; and

(c) the third stab wound measured 1.5cm on the back of the abdomen. The inner end was sharply cut and the outer end was blunt. The wound was directed forward along the abdominal wall cutting subcutaneous tissue and exited out on the front of the abdomen, causing a cut measuring 3.5cm long. This injury did not enter the abdominal cavity and did not cause any injury to the organs.

[15] PW13 had also testified that from her observation of the wounds and the knife, the three stab wounds were caused by only one weapon used to inflict the wounds. She also testified that the injuries inflicted were sufficient in the ordinary course of nature to cause death. From the post mortem conducted by her, she concluded that the cause of death was stab wound to the abdomen, of the two stab wounds to the abdomen it was the upper of the two stab wounds shown in photo (exhs P3(5)–(6)) that caused the death.

[16] The learned judge had also dealt with the contention of the defense that the cause of death was not the stab wounds but the delay in attending to the deceased by the Casualty Department of QEH and the failure to call the surgical team to testify as to what surgery was performed, an adverse inference under s 114(g) of the Evidence Act 1950. This is what he said:

With regard to the allegation of delay in treating the deceased, the post-mortem report (exh P38) also contains medical history obtained from the deceased's medical notes and from Dr Chieng Thiong How who was the medical officer in charge. This shows that surgery was commenced at 8.30pm and ended at 12.30am. Given the fact that the charge states that the incident happened at about 6.15pm, the deceased was being operated on within about two hours of the incident. The post-mortem report also shows that as soon as the deceased was admitted to the Casualty Department, resuscitation and intubation were commenced immediately and emergency surgery planned but the deceased went into cardio-respiratory arrest twice before surgery. What was stated in the report was in fact elicited in evidence during the cross-examination by Dr Jessie Hui.

With regard to the allegation that no attempt was made to stabilize the deceased and stop her massive bleeding, Dr Jessie Hui testified in her cross-examination that the Casualty Department did try to stabilise the deceased by stabilising her blood pressure so that she can manage surgery and that since the deceased had suffered internal injuries and bleedings, only surgery could stop the bleeding.

With regard to the deceased's gall bladder, Dr Jessie Hui explained in cross-examination that the deceased's gall bladder was removed during the laporotomy to stop the bleed to the liver and that after the gall bladder was removed, the liver stopped bleeding.

[17] As for who had caused those stab wounds, the learned judge relied on the evidence of PW3 who was present at the scene of the incident and her identification of the appellant in the dock. Her testimony was simply that it was the appellant who stabbed her mother on 31 October 2004.

[18] The complaint of the identification parade by the defence was also dealt with by the learned judge in the following manner:

The defence has taken strong objection to the way the identification parade was conducted which they contend was unfair to the accused. In particular the defence complains that the other persons who participated in the identification parade were not of the same race or ethnic background as the accused, and, it is not known whether any of the other participants had long hair like the accused as no photographs were available of the participants since the negatives of the photographs taken at the identification parade were inadvertently spoilt or destroyed by water leaking from an air-conditioner. The defence had also complained that the evidence of the officer conducting the identification parade was so confusing it would be unsafe to rely on such evidence.

I agree with the defence that in the absence of evidence of particulars of the race and ethnic background of the other participants in the identification parade and without the benefit of photographs of the identification parade, it would be unsafe to rely on the results of the identification parade. However, even without relying on the evidence of the identification parade, I accept the testimony of Sharneal Chai (PW3) that she recognised and could identify the accused as the person who stabbed her mother because the basis of PW3's ability to identify the accused as the assailant,

whether at the identification parade or in court is the same, namely, that she had the opportunity to clearly seen the face of the person who was attacking her mother.

[19] The evidence of PW3 of course was corroborated by the DNA analysis of PW12 which had linked the blood sample found on the knife to that of the deceased. So even without of the evidence of the identification parade, there is uncontroverted evidence to establish this ingredient of the charge. Accordingly we also see no error on the part of the learned judge to warrant us to intervene.

Third ingredient

[20] As for the third ingredient this is what the learned judge said:

> This ingredient has to do with the mens rea element of the crime of murder. Here, the evidence shows that the stab wounds were inflicted on the deceased using a sharp pointed lethal weapon, in the form of the knife (exh P5). The evidence also shows that the stab wounds were inflicted to a vital part of the body. The wounds were not inflicted to the hands or legs of the deceased but to her chest and abdomen. Further, the wounds were inflicted with considerable force because it is the evidence of PW4 that it seemed to him as if the person he saw was trying to punch the lady in the car. The medical evidence shows that the fatal stab wound had penetrated into the abdomen and cut the liver of the deceased. Even further still, the accused had delivered not just one blow but three blows to the deceased's chest and abdomen using a sharp pointed weapon. In fact it is the evidence of Dr Jessie Hui (PW12) that the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. In my judgment, the proper inference to be drawn from these facts is that the accused had intended to cause bodily injury to the deceased which he knew would likely cause death.

[21] Intention of the appellant of course can only be deduced from his conduct and the surrounding circumstances. In this case the learned judge relied on the stab wounds inflicted on the deceased and having considered his detailed analysis we find that his conclusion cannot be faulted.

[22] To sum up, it is our view that the learned judge in his detailed analysis of evidence had rightly concluded that a prima facie had been proved by the prosecution. Our view was formed after testing with care the reasons for his conclusion with the evidence tendered by the prosecution. It can also be seen from the grounds the learned judge had left no stone unturned so to speak and had rebutted every contention raised by learned counsel for the appellant at the end of the prosecution case. In short, the learned judge had correctly applied the maximum evaluation test as required by law set out in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393.

[23] We are also in no doubt that because of the correctness of the learned judge's grounds, learned counsel for the appellant to his credit had not in his submission seriously challenged the finding of the learned judge of a prima facie case.

Ground 2: Rejection of the appellant's defence

[24] With respect to learned counsel for the appellant, that contention is contrary to what the learned judge did. This can be easily gleaned from the grounds of judgment. The learned judge from the outset set out the appellant's defences which in his words were this:

> The accused gave evidence on oath. He said that on 31 October 2004, he went to the Centre Point in Kota Kinabalu with a group of about seven persons, of which he could only remember one person named Gam. At the Centre Point, the group discussed about carrying out a robbery. They then split into two groups. The accused's group consisting of four persons made their way to Asia City. Gam was in his group.
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> The accused admitted to robbing the deceased. He said, he and the three others approached the deceased's car. The deceased was about to start her car when he pointed a knife at her chest and tried to grab her pouch bag but the deceased kicked him and he fell. On his falling down two of his friends rushed past him and went to the door of the car where he first stood, while his other friend assisted him to get up. Once he got up, he pushed part his two friends as he wanted to get to the deceased's cash but by then the deceased was already in a motionless state with blood oozing out of the side of her body.

[25] This description of the defence in our view is an accurate one and not challenged by learned counsel for the appellant. What the learned judge did after that was a detailed explanation as to why the appellant's defence cannot be believed and it can be summarised as follows:

(a) the appellant's defense of not having stabbed the deceased is contrary to his own evidence in examination-in-chief where he admitted to stabbing the deceased on the chest before she kicked him;

(b) the appellant's evidence during cross-examination is far from satisfactory. On one hand he agreed to the stabbing of the deceased and when asked why he did it, he said he did not stab the deceased;

(c) the appellant's evidence that he stabbed twice on the chest is contrary to the undisputed evidence that the deceased suffered one wound to the chest and the abdomen respectively;

(d) the appellant's contention that there were three other friends during the incident is an afterthought for the simple reason that this was never

A disclosed during the prosecution case, in particular during the cross-examination of the PW3 and PW4 who saw the incident;

(e) the contention that the appellant used a folding knife to stab the deceased was also rejected on the ground that it was not put to the witnesses of the
B prosecution; and

(f) learned counsel's assertion that the blood stain of PW3 should have been found on the knife as she had testified she grabbed the knife resulting in her hand being cut was rejected on the ground that the chemist was not called to explain the absence nor was it asked of him why PW3 DNA was
C not found on the knife.

[26] We have examined the above grounds of the learned judge in the context of the totality of the evidence and are of the view that his analysis stand
D up to the test of intense and detailed scrutiny. It can be seen that only on two occasions that the learned judge utilised the appellant's failure to put his case during the prosecution case to reject the appellant's defence. However the learned judge had referred to other overwhelming evidence as to why the defence should be rejected and for that reason we see no merit in learned
E counsel's contention. It is not insignificant that learned counsel for the appellant in his submission before us never seriously disputed the stabbing.

Ground 3: The appellant's mens rea or intention to commit murder at the end of trial

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[27] Learned counsel's submission is basically that it was a robbery that went wrong in that there was no intention on the part of the appellant to kill the deceased. In our view the learned judge had correctly made the right inference
G when dealing with the third ingredient of the offence concerning the mens rea of the appellant. And as such we also find no merit in this ground.

[28] The established principle of law of an appellate court not interfering in the finding of facts by the trial court must be applied in this appeal for the
H simple reason that for every conclusion which the learned judge came to, he provided reasons which in our view are credible and most importantly

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supported by evidence.

CONCLUSION

[29] For reasons stated above, we dismiss the appeal and affirm the conviction and sentence of the learned judge.

Appeal dismissed.

Reported by Afiq Mohamad Noor